IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BERWIND MEDICAL, INC.	:	CIVIL ACTION
v.	:	
INVATECTION INSURANCE COMPANY	:	NO. 96-6386

MEMORANDUM AND ORDER

Fullam, Sr. J. August , 1997

Plaintiff was a vendor of hospital equipment manufactured by a firm named Invacare. The defendant Invatection Insurance Company provided liability coverage to Invacare and, with respect to any defects in Invacare's equipment, Invacare's vendors, such as plaintiff.

In 1990, Joanne Hagan and her husband Karl Hagan sued plaintiff and Invacare for damages sustained when Mrs. Hagan received an electrical shock while using a hand-held control on a hospital bed manufactured by Invacare and sold by plaintiff Berwind. In that action, Berwind cross-claimed against Invacare for indemnity and contribution, but its cross-claim was later dismissed with prejudice.

The Hagans' claims were settled, and Berwind allegedly incurred some $87,000 in expenses in defending itself against the Hagan claims. Plaintiff now seeks to recover that sum from the defendant Invatection Insurance Company. Both sides have moved for summary judgment.

Plaintiff's counsel has conceded that the controlling

decision of the Third Circuit Court of Appeals in Charter Oak Fire Insurance Company v. Sumitomo Marine and Fire Insurance Company, 750 F.2d 267 (3rd Cir. 1984) warrants summary judgment in favor of the defendant. Plaintiff argues, however, that the Charter Oak case was wrongly decided, and that this Court should adopt the views expressed by the persuasive dissent in that case.

Plaintiff's counsel argues that the Charter Oak court's prediction of Pennsylvania law was inconsistent with earlier decisions of the Pennsylvania Appellate Courts, and that its expansive view of collateral estoppel principles reflected New Jersey's "entire controversy" doctrine, and misconstrued Pennsylvania's procedural rules. All such arguments should be addressed to the Court of Appeals, not this court.

I note further, however, the following: Under any view of the matter, plaintiff is precluded from obtaining indemnification from the defendant, since the state court litigation of the Hagan case conclusively established that the accident was caused by improper servicing/repair of the offending electrical control, for which plaintiff Berwind, and not Invacare, was responsible. The most that could be said is that, since the Hagan complaint included product liability claims which could have been within the coverage afforded by the defendant Invatection, the defendant should have defended the action on Berwind's behalf, at least until such time as non-coverage was clear. But this obligation certainly did not extend to the full amount of defense costs now being sought by plaintiff Berwind. Moreover, since it

was later determined, in the Hagan litigation, (1) that the accident was caused by Berwind's own negligence, not within defendant's coverage, and (2) that Berwind's destruction of the offending electrical control shortly after the accident precluded any recovery against Invacare it is at least arguable that Berwind was chargeable with actual knowledge of the inapplicability of the vendor's endorsement; and it is also at least arguable that Invatection would have valid policy defenses based on non-cooperation. Accordingly, regardless of the correctness of the Charter Oak decision, plaintiff's likelihood of success in this action seems remote.

An Order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BERWIND MEDICAL, INC.	:	CIVIL ACTION
	:	
v.	:	
	:	
INVATECTION INSURANCE COMPANY	:	NO. 96-6386

ORDER

AND NOW, this day of August, 1997, IT IS ORDERED:

1. Plaintiff's Motion for Summary Judgment is DENIED.

2. Defendant's Motion for Summary Judgment is GRANTED.

3. This action is DISMISSED WITH PREJUDICE.

John P. Fullam, Sr. J.